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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

AFC-LOW INCOME HOUSING CREDIT PARTNERS-I et al., Plaintiffs and Respondents, v. POZ VILLAGE DEVELOPMENT, INC. et al., Defendants and Appellants.	B237721 (Los Angeles County Super. Ct. No. BC 354676)

APPEAL from orders of the Superior Court of Los Angeles County, Ralph Dau, Judge. Reversed and remanded with directions.

Kennedy & Kamrowski and J. Grant Kennedy, for Defendants and Appellants.

Reuben Raucher & Blum, Timothy D. Reuben and Stephen L. Raucher, for Plaintiffs and Respondents.

I. INTRODUCTION

Plaintiffs, AFC–Low Income Housing Credit Partners–I, Investment in Affordable Housing, L.P. ("AFC"), American Housing Partners–16, L.P. ("AFC-16"), Housing Preservation Partners, L.P. ("HPP"), and United Housing Preservation Corporation ("United"), filed the original complaint for (1) declaratory relief and (2) disassociation of partners. The defendants are POZ Village Development, Inc. ("POZ") and the Bedford Group ("Bedford"). POZ and Bedford appeal the vacating of an interlocutory judgment based on an order granting a motion to confirm an appraisal award.

II. BACKGROUND

This action was filed on June 28, 2006 in connection with an effort of United, a general partner, to buy out general partners POZ and Bedford. They were general partners of the Coliseo Housing Partnership (the "partnership") which was formed to develop and operate a multi-family apartment building for low-income tenants. AFC, AFC-16, and HPP were limited partners of the partnership. The partnership is governed by the "Amended and Restated Agreement of Limited Partnership" of Coliseo Housing Partnership, effective as of May 1, 1990, as subsequently amended (the "agreement").

Under the partnership agreement, if a general partner was removed, the remaining or successor general partner may elect to "buy out the General Partner's General Partner Interest at its fair market value determined as set forth in Section 9.01(b) hereof." Under section 9.01(b) of the agreement, the fair market value of that "interest" is determined by an appraisal process by which each party appoints an appraiser, and if those appraisers don't agree, a third appraiser shall be appointed. "The decision, in writing, of the third appraiser shall be binding and conclusive on the withdrawing General Partner and the Successor General Partner . . . ."

In April 2006, written notice was given to POZ and Bedford of their removal as general partners. On October 17, 2006, United served notice on POZ and Bedford of its

intention to buy out their partnership interests pursuant to section 9.02(f) of the agreement. On November 27, 2006, the trial court ordered the parties to submit to the arbitration process pursuant to section 9.01(b).

On October 26, 2007, after having appointed their respective appraisers, the parties exchanged their appraisals. United provided defendants an updated valuation by United's appraiser dated August 4, 2008. United's appraiser determined the fair market value of defendants' collective 1.5% partnership interests to be $42,000. United's appraiser used the "'willing buyer, willing seller'" analysis. Defendants' appraiser found that the value of defendants' combined general partners' interest in the partnership was equal to $6,928,695 and that the value of defendants' combined debt interest in the partnership was equal to $6,145,548. When the parties could not agree on who should serve as the contractually required third appraiser, the court on October 15, 2008, appointed William A. Hanlin, Jr.,("Hanlin").

A hearing was held before Hanlin on February 18, 2009. Hanlin transmitted his "Valuation of the Partnership Interests of POZ Village Development Corporation and the Bedford Group in the Coliseo Housing Partnership" ("original award") on March 23, 2009. The original award included the "Developer's Note" in the valuation of defendants' interest. Three exhibits which had not been provided to plaintiffs were attached to the original award. During a lunch break of the February 18, 2009 valuation conference, Hanlin asked Bedford's principal to provide Hanlin with copies of financial statements of Bedford. The exhibits were provided in response to the request.

On April 27, 2009, Hanlin served his revised award (the "award"). The award stated that the values of the interests held by POZ and Bedford were made up of three components:

	Due to POZ	Due To Bedford
Debit Equity – Developer's note	$2,857,474	$2,857,474
Partner's capital	1,970,951	68,614
Share of gain from appreciation of property	63,233	126,466
	$4,891,658	$3,052,554

On June 12, 2009, the trial court denied United's motion to vacate arbitration award and granted defendants' petition and motion to confirm award. On August 3, 2009, the trial court entered an "Interlocutory Judgment Regarding Valuation Determined By Appraisal."

By minute order dated December 14, 2009, the trial court granted United's leave to file an amended and supplemental complaint. On January 11, 2010, United filed a first amended and supplemental complaint. The trial court bifurcated the case to hear the non-jury causes of action first. Phase One of the trial on the causes of action for rescission took place in February 2011. The trial court found for the defendants and rejected United's claims.

On its own motion, the trial court issued a minute order dated May 12, 2011, stating that it was reconsidering its June 12, 2009 order confirming the appraiser's award and the interlocutory judgment filed on August 3, 2009, "[b]ased on the holding in *Safeco Ins. Co. v. Sharma* (1984) 160 Cal.App.3d 1060, and the evidence and briefs received on the Phase One Trial . . . ." The minute order requested that the parties brief, among other things, whether the court has "the power to vacate its order confirming the appraiser's award and to enter a new and different order vacating the appraiser's award on the ground the appraiser exceeded his powers? [¶] Does the court have the power to vacate the Interlocutory Judgment?"

Both parties submitted briefs on May 27, 2011. The trial court then issued another minute order on August 1, 2011 setting a hearing for August 17, 2011, "to afford the parties an opportunity to express their views on the court's reconsideration of the June 12, 2009 order confirming the appraiser's award and the Interlocutory Judgment, filed

August 3, 2009." On August 17, 2011, the trial court heard oral argument and took the matter under submission.

On October 7, 2011, the trial court issued its order on reconsideration by which it found that the appraiser had exceeded his powers, requiring that the June 12, 2009 order confirming the award and resulting interlocutory judgment be set aside. The trial court stated: "An appraiser is required to determine the issue specified in the agreement of the parties, and the court may vacate the award of an appraiser who exceeds his powers by deciding a question he was not authorized to decide. [Citation.] . . . [¶] The court has interpreted the agreement to mean that the appraiser was to determine the fair market value of POZ's and Bedford's interests in the partnership. . . . For the guidance of the parties and the appraiser(s), the court interprets the term 'fair market value,' as used in the agreement, to mean the price that a willing buyer would pay a willing seller, neither being under any compulsion to sell or buy. POZ's and Bedford's interests in the partnership do not include any interest in what the parties have referred to as the Developer's Note. . . . [¶] The appraiser's award purports to determine a 'replacement' value, made up of (1) principal and interest accrued under the Developer's Note, (2) the 'adjustment' required 'in order for [POZ's and Bedford's] respective capital accounts to be in alignment with their partnerships percentages,' and (3) POZ's and Bedford's 'respective share of the net appreciation in the value of the apartment complex.' In these and other respects the appraiser exceeded his powers. The appraiser did not determine the fair market value of POZ's and Bedford's partnership interests, and the award cannot be corrected. . . ."

III. DISCUSSION

The first issue that we have to resolve is whether the trial court had the power to reconsider or vacate the interlocutory judgment entered on August 3, 2009. It is clear that the interlocutory judgment in the present case was not final. (*Rubin v. Western Mutual Insurance Co.* (1999) 71 Cal.App.4th 1539, 1546.) The award only established

the value of the interest of POZ and Bedford in the Coliseo Housing Partnership. Other causes of action in the first amended and supplemental complaint filed on January 11, 2010, were still pending when the trial court issued the minute order of May 12, 2011, giving notice of its intention of reconsidering its June 12, 2009 order confirming the appraiser's award and the interlocutory judgment. An interlocutory judgment is subject to modification prior to entry of the final judgment. (*Rose v. Boydston* (1981) 122 Cal.App.3d 92, 97; *Travelers Insurance Co. v. Superior Court* (1977) 65 Cal.App.3d 751, 760.)

We now turn to the question of whether the trial court violated defendants' due process rights when it reconsidered its June 12, 2009 order confirming the appraiser's award and the interlocutory judgment filed August 3, 2009.

"A trial court has the inherent power to correct its own errors. [Citation.] In exercising this power, the court may, on its own motion, reconsider a prior interim order to make such a correction. [Citation.] However, to be fair to the parties, the court must inform the parties of its concern that one of its prior interim orders may have been erroneous, solicit briefing, and hold a hearing. [Citation.]" (*Montegani v. Johnson* (2008) 162 Cal.App.4th 1231, 1238.)

Here the trial court complied with the suggested procedural prerequisites to changing its order. In its May 12, 2011 minute order, the trial court informed the parties that it was "reconsidering its June 12, 2009 order confirming the appraiser's award and the Interlocutory Judgment filed August 3, 2009." The minute order requested briefs from the parties on the question of whether, among other things, the court has "the power to vacate its order confirming the appraiser's award . . . on the ground the appraiser exceeded his power[s]." The trial court subsequently set a hearing for August 17, 2011 "to afford the parties an opportunity to express their views on the court's reconsideration . . . ."

We now turn to the issue of whether the trial court erred by granting after reconsideration United's motion to vacate the appraisal award because the appraiser exceeded his power. We are of the opinion that it did.

In its ruling after reconsideration, the trial court wrote: "An appraiser is required to determine the issue specified in the agreement of the parties, and the court may vacate the award of an appraiser who exceeds his powers by deciding a question he was not authorized to decide. (*Jefferson Ins. Co. v. Superior Court* (1970) 3 Cal.3d 398.) [¶] For the guidance of the parties and the appraiser(s), the court interprets the term 'fair market value,' as used in this agreement, to mean the price that a willing buyer would pay a willing seller, neither being under any compulsion to sell or buy. POZ's and Bedford's interests in the partnership do not include any interest in what the parties have referred to as the Developer's Note." The trial court found that the appraiser exceeded his power.

We disagree with that finding. The appraiser's scope of authority is set by the agreement. Section 9.01(b) provides the process to be used when a general partner or successor general partner elects to buy out the withdrawing "General Partner's General Partner Interest" at fair market value. "The withdrawing General Partner shall appoint an appraiser. Within 15 days after receiving notice of such appointment, the Successor General Partner shall appoint an appraiser. If the two appraisers so appointed shall be unable to agree on the fair market value of the withdrawing General Partner's General Partner Interest within 30 days, they shall appoint a third appraiser. The decision, in writing, of the third appraiser shall be binding and conclusive on the withdrawing General Partner and the Successor General Partner. . . ."

The language in the agreement does not specify what methodology should be used. It does not define present market value. The agreement which appears to be negotiated by business entities leaves it up to the appraisers to determine what methodology should be utilized. The appraiser, Hanlin, did not exceed his powers. No limitation was set in the agreement.

Appraisals are included within the scope of arbitrations. Code of Civil Procedure section 1280 provides in part: "(a) 'Agreement' [to arbitrate] includes . . . agreements providing for valuations, appraisals and similar proceedings . . . ." (*Klubnikin v. California Fair Plan Assn.* (1978) 84 Cal.App.3d 393, 397-398.)

"An arbitrator exceeds his powers when he acts without subject matter jurisdiction [citation], decides an issue that was not submitted to arbitration [citations], arbitrarily remakes the contract [citation], upholds an illegal contract [citation], issues an award that violates a well-defined public policy [citation], issues an award that violates a statutory right [citation], fashions a remedy that is not rationally related to the contract [citation], or selects a remedy not authorized by law [citations]. In other words, an arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443.)

United is essentially attacking Hanlin's appraisal methodology. Hanlin interpreted the language of section 9.01(b) in a manner consistent with his professional experience as an appraiser and came to a conclusion that a valuation of defendants' general partner interest should include defendants' debt interest.

Accordingly, we reverse and remand with directions to the trial court.

IV. DISPOSITION

The trial court's orders of October 7 and 11, 2011, granting United's motion to vacate the arbitration award and denying defendants' petition and motion to confirm the award, and vacating the interlocutory judgment filed August 3, 2009, are reversed. The case is remanded for further proceedings. The trial court is directed to reinstate its order of June 12, 2009 denying United's motion to vacate the arbitration award and granting defendants' petition and motion to confirm award. The trial court is further instructed to

reinstate the interlocutory judgment regarding valuation determined by appraisal filed August 3, 2009. The parties are to bear their own costs on appeal.

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FERNS, J.*

We concur:

TURNER, P.J.

KRIEGLER J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.